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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

KENNETH DONALD MCCURDY,) No. C 07-05084 CW (PR)
)
Petitioner,) ORDER DENYING RESPONDENT'S MOTION TO
) DISMISS AND SETTING BRIEFING
v.) SCHEDULE
)
BEN CURRY, et al.,) (Docket no. 6)
)
Respondent.)
_____)

INTRODUCTION

Petitioner Kenneth Donald McCurdy is a prisoner of the State of California who is incarcerated at the California Training Facility in Soledad. He filed a pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging the constitutionality of the denial of his parole by the California Board of Parole Hearings. Originally, Petitioner filed the petition in the United States District Court for the Central District of California. In an Order dated July 26, 2007, the petition was transferred to this Court.

On March 21, 2008, Respondent filed a motion to dismiss the petition, alleging: (1) that Petitioner's claims were not properly exhausted at the state level, and (2) that his federal petition fails to allege any basis for relief under the Antiterrorism and Effective Death Penalty Act (AEDPA). (Mot. to Dismiss at 3-4.) On March 31, 2008, Petitioner filed an opposition. On April 9, 2008, Respondent filed a reply.

For the reasons discussed below, the Court DENIES Respondent's motion to dismiss.

BACKGROUND

On September 22, 1983, Petitioner was convicted of second-degree murder and was sentenced to fifteen years to life imprisonment. (Pet. at 2.) On September 7, 2006, Petitioner appeared before the California Board of Parole Hearings (Board) for a parole suitability hearing. The Board found Petitioner unsuitable for parole.

Petitioner filed a state habeas petition in the Kern County Superior Court challenging the Board's decision, which was denied on March 20, 2007. (Id. at 6.) On April 6, 2007, Petitioner filed a state habeas petition in the California Court of Appeal, which was denied on April 12, 2007. (Id. at 13.) On April 20, 2007, Petitioner filed a petition for review in the California Supreme Court, which was denied on June 27, 2007. (Id. at 15.)

Petitioner filed the present petition, alleging: (1) that the Board violated Petitioner's due process rights by using "unchanging factors" in making a determination regarding his unsuitability for parole, and (2) that the Board continued to use outdated information to deny parole and overlooked current reports submitted by Petitioner. (Id. at 7.)

DISCUSSION

Respondent argues that Petitioner's claims were not presented to the California Supreme Court and therefore were not exhausted. In his opposition, Petitioner maintains that all of his federal claims have been presented before the state supreme court.

Prisoners in state custody who wish to challenge collaterally in federal habeas proceedings either the fact or length of their confinement are first required to exhaust state judicial remedies,

1 either on direct appeal or through collateral proceedings, by
2 presenting the highest state court available with a fair
3 opportunity to rule on the merits of each and every claim they seek
4 to raise in federal court. See 28 U.S.C. § 2254(b), (c); Rose v.
5 Lundy, 455 U.S. 509, 515-16 (1982); Duckworth v. Serrano, 454 U.S.
6 1, 3 (1981); McNeeley v. Arave, 842 F.2d 230, 231 (9th Cir. 1988).
7 The State's highest court must be given an opportunity to rule on
8 the claims even if review is discretionary. See O'Sullivan v.
9 Boerckel, 526 U.S. 838, 845 (1999) (petitioner must invoke "one
10 complete round of the state's established appellate review
11 process").

12 The exhaustion requirement is not jurisdictional, but rather a
13 matter of comity. See Granberry v. Greer, 481 U.S. 129, 133-34
14 (1987). However, a district court may not grant the writ unless
15 state court remedies are exhausted or there are exceptional
16 circumstances. See 28 U.S.C. § 2254(b)(1); Edelbacher v. Calderon,
17 160 F.3d 582, 585 (9th Cir. 1998) (requiring "extremely unusual
18 circumstances").

19 The exhaustion-of-state-remedies doctrine reflects a policy of
20 federal-state comity to give the State "the initial 'opportunity to
21 pass upon and correct' alleged violations of its prisoners' federal
22 rights." Picard v. Connor, 404 U.S. 270, 275 (1971) (citations
23 omitted). The exhaustion requirement is satisfied only if the
24 federal claim (1) has been "fairly presented" to the state courts
25 or (2) no state remedy remains available. Peterson v. Lampert, 319
26 F.3d 1153, 1155-56 (9th Cir. 2003) (en banc) (citations omitted).
27 A claim is "fairly presented" only if the petitioner either
28 referred to specific provisions of the federal constitution or

1 federal statutes, or cited federal or state case law analyzing the
2 federal issue. See id. at 1158. The specific factual basis of the
3 federal claim also must be presented to the highest state court.
4 Kelly v. Small, 315 F.3d 1063, 1067-69 (9th Cir. 2003), overruled
5 on other grounds by Robbins v. Carey, 481 F.3d 1143, 1148 (9th Cir.
6 2007).

7 For purposes of exhaustion, pro se petitions in state court
8 may be read differently from counseled petitions. Peterson, 319
9 F.3d at 1159 ("[T]he complete exhaustion rule is not to trap the
10 unwary pro se prisoner.") (citation omitted). "When a document has
11 been written by counsel, a court should be able to attach ordinary
12 legal significance to the words used in that document." Id. at
13 1158. When it has been written by a pro se petitioner, a court may
14 need to be more flexible. See, e.g., Sanders v. Ryder, 342 F.3d
15 991, 999 (9th Cir. 2003) (petitioner's pro se status in state court
16 was a factor in favor of finding exhaustion where prisoner claimed
17 ineffective assistance of counsel but failed to cite federal
18 constitution or federal case law in support of his claim). Neither
19 confused arguments nor poor lawyering will necessarily defeat a pro
20 se petitioner's otherwise-adequate efforts to assert a federal
21 claim in state court. Sandqathe v. Maass, 314 F.3d 371, 378 (9th
22 Cir. 2002) (holding that citation of inapposite federal cases did
23 not change fact that petitioner raised pertinent argument on
24 appeal; argument was deemed "fairly presented" because state courts
25 expressly addressed federal claim, directly or by implied adoption
26 of lower court ruling, even though petitioner did not expressly
27 assert federal grounds for relief).

1 Here, on his federal habeas petition form, Petitioner lists
2 two grounds for relief: (1) a due process claim, and (2) a claim
3 labeled "liberty interest." (Pet. at 7.) Under the supporting
4 facts section of his federal due process claim, Petitioner alleges
5 that the Board's use of unchanging factors to support a finding of
6 his unsuitability for parole violated his due process rights.
7 (Id.) Petitioner's second claim, labeled "liberty interest," is
8 essentially an assertion that he has a liberty interest in parole.
9 Although this is true, it is not a separate ground for relief that
10 must be exhausted. Under the supporting facts section of his
11 second claim, Petitioner complains of the Board's continued use of
12 outdated information and its failure to consider the 2006 Mental
13 Health Evaluation conducted by Soledad Correctional Training
14 Facility Psychologists Dr. M. Macomber and Dr. B. Zika in its
15 determination that he is unsuitable for parole. (Id.) The Court
16 construes this allegation as part of his due process claim. See
17 Peterson, 319 F.3d at 1159.

18 In his motion to dismiss, Respondent treats the federal
19 petition as containing two claims: (1) that the Board violated
20 Petitioner's federal due process rights "by relying on unchanging
21 factors in determining that he is unsuitable for parole," and
22 (2) that the "continued use of outdated evidence violates his
23 liberty interest." (Mot. to Dismiss at 2.) Respondent argues that
24 both claims are unexhausted because Petitioner's federal claims are
25 different from the claims he presented in state court.

26 The petition for review filed in the state supreme court is
27 attached to Petitioner's federal petition. (Pet'r Ex. 3.) The
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1 Court notes that page two, labeled "Jurisdiction and Questions
2 Presented," is missing. (Pet. at 18.) However, attached to the
3 petition for review is Petitioner's habeas petition filed in the
4 state appellate court. (Id. at 20-26.) Similar to his federal
5 petition, Petitioner listed the two grounds for relief in his state
6 habeas petition as: (1) a due process claim, and (2) a claim
7 labeled "liberty interest." (Pet. at 22-24.) Under the supporting
8 facts section of his state due process claim, Petitioner stated,
9 "See Attachments and Page #3 of Exhibit B." (Id. at 22.) The
10 Court notes that these attachments include the 2006 Mental Health
11 Evaluation mentioned above and the transcript of the Board hearing.
12 (Id. at 27-95.) In the "supporting cases, rules, or other
13 authority" section of his state due process claim, Petitioner
14 argued that the Board violated his due process rights by failing to
15 include the plea agreement as a factor in its determination of his
16 suitability for parole. (Id. at 22-23.) Meanwhile, under the
17 supporting facts section of his second claim, Petitioner asserted
18 that he had a liberty interest in parole. (Id. at 24.) Within
19 that same section, Petitioner quoted from the dissent in Sass v.
20 California Bd. of Prison Terms, 461 F.3d 1123 (9th Cir. 2006):

21 Circuit Judge Reinhardt, in dissenting [stated], "I am
22 compelled to dissent from the majority's refusal to
23 grant relief to a person whose continued incarceration
24 'runs contrary to the rehabilitative goals espoused by
25 the prison system and could result in a due process
26 violation.'"

27 (Pet. at 24.) In that section, Petitioner also argued that the
28 Board "has failed to show and must show that he 'PRESENTLY'
29 present[s] a danger to society." (Id.) He cited the 2006 Mental
30 Health Evaluation in support of this assertion. (Id.) In the

1 "supporting cases, rules, or other authority" section of his second
2 claim, Petitioner cited federal cases analyzing issues similar to
3 the alleged due process violations in his federal petition,
4 including Sass, 461 F.3d at 1123, McQuillion v. Duncan, 306 F.3d
5 895 (9th Cir. 2002), and Biggs v. Terhune, 334 F.3d 910 (9th Cir.
6 2003).

7 Respondent argues that the first claim in Petitioner's state
8 petition was a state due process claim relating to his plea
9 agreement: "Petitioner's sole due process claim presented to the
10 state supreme court is that the Board violated his plea agreement
11 when it denied him parole and violated his constitutional rights by
12 disregarding the amount of time he already served on his second-
13 degree murder conviction." (Mot. to Dismiss at 3.) Respondent
14 construes Petitioner's second claim as an alleged "liberty
15 interest" violation, stating: "Petitioner argues that the Board
16 violated his liberty interest in parole by failing to show that he
17 'PRESENTLY' present[s] a danger to society." (Id.) In addition,
18 Respondent maintains that Petitioner's second claim includes an
19 argument that the Board relied on "no evidence" to show he is a
20 current danger to society. (Id. at 4.)

21 Respondent is correct that Petitioner's claim of a due process
22 violation relating to the plea agreement, which was presented at
23 the state level, is not included in the federal petition. However,
24 Petitioner's allegations relating to the plea agreement were not
25 the sole basis for his state due process claim. It is evident from
26 the attached state habeas petition that Petitioner presented
27 additional due process arguments under the second claim labeled
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1 "liberty interest" in his state petition. (Pet. at 24.) The
2 arguments in his second state claim do not comprise an independent
3 substantive "liberty interest" claim, as Respondent has construed
4 it. Instead, Petitioner's second state claim is also a due process
5 claim. On every occasion where Petitioner discusses violations of
6 his "liberty interest," he mentions violations of his due process
7 rights. (Id. at 5, 24.) As previously mentioned, Petitioner cites
8 cases relevant to due process violations under his second state
9 claim. (Id. at 24.)

10 Moreover, Respondent's argument that Petitioner alleged two
11 separate claims of a "liberty interest" violation in his state and
12 federal petitions is not well-taken. Respondent maintains that
13 "the state petition argues that there is no evidence to show that
14 he is a current danger, whereas the federal petition argues that
15 there may have been evidence that the Board relied on, but
16 Petitioner deems this evidence unreliable." (Mot. to Dismiss at
17 4.) Nonetheless, both Petitioner's state and federal habeas
18 petitions include claims of due process violations based on the
19 lack of evidence to support the Board's determination that he is a
20 current danger to society. (Pet. at 7, 24.) Petitioner alleges in
21 both petitions that the Board should have considered the 2006
22 Mental Health Evaluation, which states, "The prognosis for
23 successful adjustment in the community is excellent." (Id. at 32.)

24 In sum, Petitioner did not include in his federal habeas
25 petition the allegations from his state due process claim relating
26 to the plea agreement, but instead he included due process
27 violations stemming from the Board's denial of parole based on its
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1 (1) reliance on unchanging factors, and (2) continued use of
2 outdated information. These two claims of due process violations
3 were presented in a slightly different way in his state and federal
4 habeas petition. While these two claims were subsumed within the
5 second claim entitled "liberty interest" in the state petition,
6 they have been divided and discussed as two separate claims in the
7 federal petition. The Board's reliance on unchanging factors is
8 discussed under the first claim of the federal petition, while the
9 Board's use of outdated information instead of the more current
10 2006 Mental Health Evaluation is discussed under the second claim.
11 This difference in the organizational structure of Petitioner's
12 state and federal petitions does not alter the fact that he "fairly
13 presented" his federal due process claims in state court,
14 particularly in light of his pro se status in state court. See
15 Peterson, 319 F.3d at 1159. Therefore, the Court finds that
16 Petitioner has fully exhausted his two federal due process claims
17 at the state level. Accordingly, the Court DENIES Respondent's
18 motion to dismiss the federal petition as unexhausted.

19 Respondent also argues that Petitioner has not alleged any
20 basis for relief under the AEDPA in his federal petition.

21 Under the AEDPA, a district court may grant a petition
22 challenging the denial of parole on the basis of a claim reviewed
23 on the merits in state court only if the state court's adjudication
24 of the claim: "(1) resulted in a decision that was contrary to, or
25 involved an unreasonable application of, clearly established
26 Federal law, as determined by the Supreme Court of the United
27 States; or (2) resulted in a decision that was based on an
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1 unreasonable determination of the facts in light of the evidence
2 presented in the state court proceeding." 28 U.S.C. § 2254(d).

3 Respondent claims that Petitioner's federal petition must be
4 dismissed because it "fails to cite any Supreme Court law
5 indicating that a continued reliance on the commitment offense or
6 the Board's use of historic information amounts to a due process
7 violation." (Mot. to Dismiss at 4.) However, this argument is
8 unavailing because Petitioner cited Ninth Circuit case law,
9 including Sass, McQuillion and Biggs, in support of his due process
10 claim. See Duhaime v. Ducharme, 200 F.3d 597, 600 (9th Cir. 2000)
11 (circuit court decisions may be persuasive authority to determine
12 whether a particular state court holding is an "unreasonable
13 application" of Supreme Court precedent or to assess what law is
14 "clearly established"). Therefore, the Court finds that Petitioner
15 has sufficiently alleged a basis for relief under the AEDPA.
16 Accordingly, the Court DENIES Respondent's motion to dismiss the
17 federal petition on this ground.

18 CONCLUSION

19 1. Respondent's motion to dismiss (docket no. 6) is DENIED.

20 2. Respondent is ordered to file an answer and supporting
21 documents within sixty (60) days from the date of this Order.
22 Respondent shall file with an answer a copy of all state records
23 that have been transcribed previously and that are relevant to a
24 determination of the issues presented by the petition.

25 3. If Petitioner wishes to respond to the answer, he shall
26 do so by filing a traverse with the Court and serving it on
27 Respondent within thirty (30) days of his receipt of the answer.
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1 Should Petitioner fail to do so, the petition will be deemed
2 submitted and ready for decision thirty (30) days after the date
3 Petitioner is served with Respondent's answer.

4 4. This Order terminates Docket no. 6.

5 IT IS SO ORDERED.

6 DATED: 3/10/09

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8 CLAUDIA WILKEN
9 United States District Judge
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UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

KENNETH DONALD MCCURDY,

Case Number: CV07-05084 CW

Plaintiff,

CERTIFICATE OF SERVICE

v.

BEN CURRY et al,

Defendant.

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on March 10, 2009, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Kenneth Donald McCurdy C-76230
California Training Facility
YW-117-L
P.O. Box 689
Soledad, CA 93960-0689

Dated: March 10, 2009

Richard W. Wieking, Clerk
By: Sheilah Cahill, Deputy Clerk

United States District Court
For the Northern District of California